In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-312

THOMAS FITCH GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of failing to report for induction into the Armed Services, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App.).

Although initially classified I-A, petitioner received II-S (student) deferments through 1966. After an Armed Forces physical examination in September 1966, he was found acceptable for induction. The local board reclassified him I-A on September 11, 1967, and again on January 8, 1968. He appealed [1] and on February 29, 1968,

[1] He also requested a personal appearance before the board, but failed to appear.

the appeals board classified him I–A. The local board ordered him to report for induction on March 26, 1968, but suspended its order when petitioner requested a student deferment on March 24. (Pet. App. 2.) On July 29, the board notified petitioner to report for induction on August 13. One day before his scheduled induction, petitioner sent a letter by regular mail to the local board requesting that he be classified IV–F on the basis of an accompanying doctor's memorandum which tersely stated the doctor's opinion, based on repeated examinations, that petitioner had certain physical defects. Petitioner did not report for induction on August 13, 1968. His indictment and conviction followed.

1. Under Section 12(a) of the Selective Service Act, 50 U.S.C. App. 462(a), "any person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him" by the Act or the rules and regulations thereunder is guilty of an offense. Petitioner contends he did not "knowingly" fail to report for induction. The trial court fully instructed the jury on this question[2] and, as set out in the opinion of the court of appeals (Pet. App. 4–5), the evidence amply supports the jury's finding that petitioner acted with the requisite intent. See *Harris* v. *United States*, 412 F. 2d 384 (C.A. 9).

[2] The instructions stated: "But in this case the Government must not only prove beyond a reasonable doubt that the defendant failed to report, but it must also prove that the defendant knowingly failed to report as required by law, intending with bad purpose either to disobey or to disregard the law." (Tr. 245–246.) Petitioner's attorney stated that he was satisfied with this instruction (Tr. 246).

2. Petitioner contends the trial court erred in not having 32 C.F.R. 1628.2(b) [3] read to the jury and in refusing to allow petitioner's physician to give testimony that would have corroborated petitioner's alleged belief that he was medically disqualified at the time he received his last order to report for induction. The court of appeals properly rejected both contentions (Pet. App. 5).

The regulation, which is set forth in the margin, says nothing about relieving a registrant of his duty to report for induction when he has been ordered to do so. In any event, the trial court's statement that no regulations should be quoted to the jury was not made in response to a defense motion to read such regulations. Instead, the court was explaining the procedure that would be followed at trial and neither defendant nor his attorney objected when the court said:

> Before the jury comes in—by the way, I think I made it clear that while the defendant can testify upon his reading of the regulations it was his opinion that he was entitled to this medical deferment after he received this letter, I don't want the quotation of any regulation. [Tr. 86.]

Dr. Maxwell, who had given petitioner a letter dealing with his physical condition, which petitioner sent

[3] This section was revoked on August 26, 1970. It provided: "Whenever a registrant who is in Class I-A, Class I-A-o, or Class I-o claims that he has one or more of the disqualifying medical conditions or physical defects which appear in the list described in section 1628.1, the local board shall order him to present himself for interview with the medical advisor to the local board by mailing to such registrant a Notice to Registrant to Appear for Medical Interview (SS Form 219)."

to his local board shortly before he was to report for induction, died before trial. The district court allowed petitioner to introduced Dr. Maxwell's letter, but refused to allow testimony from another physician regarding petitioner's condition (Tr. 65–66). Petitioner claims the doctor's testimony would have been relevant to the sincerity of petitioner's belief that he was medically disqualified. But the sincerity of petitioner's belief in this regard was not at issue. It was for the Selective Service System and the military, and not for petitioner, to decide whether he was qualified for military service and petitioner could not ignore an order to report for induction because he "sincerely" believed he was unqualified. Petitioner also intimates that the doctor's testimony might have been relevant to petitioner's specific intent (Pet. 20) because the doctor would have confirmed that petitioner was suffering from the malady diagnosed by Dr. Maxwell. But the government never disputed Dr. Maxwell's diagnosis.

3. Petitioner objects to the sentence in the jury instructions where the court stated: "There is no law which excuses failure to report for induction when ordered." As the court below pointed out, "This instruction [1] was taken out of context. Instructions must

[1] When the jury returned for further instructions on the regulations, the court stated: "This regulation to which I have made reference is an army regulation. I took judicial notice of it. It had to do with the question of illnesses. It does not have to do with the question of—it does not destroy the validity of the order to report. But in this case the Government must not only prove beyond a reasonable doubt that the defendant failed to report, but it must also prove that the defendant knowingly failed to report as required by the law, intending with bad

be considered as a whole. When so considered, the instructions which the trial court gave are neither misleading nor prejudicial; in fact they are more favorable to Goodman than that to which he was entitled under *Harris* v. *United States, supra.*" (Pet. App. 6.)

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1971.

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purpose either to disobey or disregard the law." (Tr. 245–246.)

The jury foreman asked, "What is the law or statutes or regulations whereby a man may legally not report for induction as ordered?" (Tr. 247.)

The Court instructed.

"There is a procedure, which was mentioned by the defendant in his letter dated August 9, 1968, to the local board, whereby a person may request a reclassification by the local board; but if the board does not grant the reclassification the order to report remains in legal effect.

"There is no law which excuses failure to report for induction when ordered, when it is ordered; but before you can convict the defendant of the crime charged the Government—it must be established, it must be established beyond a reasonable doubt, that the defendant intended with bad purpose to either disobey or to disregard the law in failing to report." (Tr. 252–253.)

U.S. GOVERNMENT PRINTING OFFICE: 1971

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DENIED
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